IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RICHARD BROCKINGTON : CIVIL ACTION

v. :

: NO. 99-CV-4961

DONALD VAUGHN, et al.

MEMORANDUM AND ORDER

McLaughlin, J. January 3, 2002

Petitioner Richard Brockington ("Brockington") has filed a counseled petition for a writ of habeas corpus under 28 U.S.C. § 2254. After careful and independent consideration of the petition, and after review of the Report and Recommendation ("R & R") of the United States Magistrate Judge, the petitioner's objections thereto, and the Commonwealth's response to the objections, the petition for a writ of habeas corpus will be denied and dismissed.

The factual and procedural history of this case are as given in the R & R, and are incorporated herein. To summarize, Brockington was involved in the murder of Milton Clark on a Philadelphia street in May of 1982. Brockington's brother had a knife and used it to stab Clark; Brockington beat the victim but did not stab him. On November 9, 1982, after a jury trial before

the Honorable Alfred F. Sabo, Brockington and his brother, who were tried jointly, were convicted of first-degree murder and criminal conspiracy in the Court of Common Pleas of Philadelphia County. Brockington's post-verdict motions were denied and he was sentenced to life in prison for the murder conviction and to a concurrent term of ten to twenty years for the conspiracy. The Superior Court affirmed the judgment of sentence on appeal.

On May 24, 1993, the petitioner filed for relief under Pennsylvania's Post Conviction Relief Act ("PCRA"), 42 Pa.C.S. §§ 9541-9546. The petitioner argued before the PCRA court that his trial counsel was ineffective for failing to object to the jury instructions given in his case relating to accomplice liability and to the intent requirement for first-degree murder. He also argued that his counsel on direct appeal was ineffective for not raising his trial counsel's failure to object to the jury instructions.

The PCRA court denied the petitioner's motion for relief, finding that his claim that his trial counsel was ineffective had been waived because he failed to raise it on direct appeal. The court went on to find that his claim that his appellate counsel was ineffective for failing to raise the instructions issue was meritless, because the instructions were appropriate. The Superior Court affirmed on the basis of the

decision of the PCRA court, and the Pennsylvania Supreme Court denied allowance of appeal.

In his habeas petition, the petitioner repeated the arguments that he made in his collateral attack at the state level. He argued that his trial and appellate counsel were ineffective for failing to object to the following two excerpts from the instructions:

> You may find the defendant guilty of a crime on the theory that he was an accomplice as long as you are satisfied beyond a reasonable doubt that the crime was committed and that the defendant was an accomplice of the person who committed it. And, this extends even to a homicide which is a contingency of the natural and probable consequences of the acts or conduct **of** the parties even though such homicide is not specifically contemplated by the parties.

Trial Transcript at 704-705.

> Thus, in order to find the defendant guilty of murder in the first degree, you must first find that the defendant caused the death ***of*** another person, or that an accomplice caused the death **of** another person. That is, you must find that the defendant or an accomplice's act is the actual legal cause of the death **of** Milton Clark and thereafter, you must determine if the killing was intentional.

Id. at 711.[1]

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[1] Although the petitioner confines his objections to the above excerpts from the instructions on **accomplice** liability and first-degree murder, for clarity, this opinion will refer to the former as the "accomplice liability charge," and to the latter as the 'first-degree murder charge."

In his reply to the Commonwealth's response to his petition, Brockington withdrew his challenge to the first-degree murder charge and stated that he would "rely exclusively" on the accomplice liability charge. The Magistrate Judge nevertheless considered both charges in his R & R. In his objections to the R & R, the petitioner stated more clearly that he was limiting his challenge to the accomplice liability charge.

The petitioner withdrew his objection to the first-degree murder charge on the ground that it was foreclosed by the decisions in Willis v. Dragovich, 97-CV-2114 (E.D. Pa. June 30, 1998), and Burroughs v. Domovich, 99-CV-1746, 2000 WL 122351 (E.D. Pa. Jan. 31, 2000), which involved challenges to the same language. The court in Willis upheld the state court's finding that the charge was not erroneous when viewed as a whole, while the court in Burroughs upheld the state court's finding that the charge did misstate the law. In both cases, the courts found that any error in the charge relating to the intent requirement for first-degree murder was harmless, because the petitioners in those cases, like the petitioner here, were convicted of conspiracy to commit murder. As the Burroughs court explained: "Since the jury was properly instructed on conspiracy to kill, and returned a guilty verdict on that count, it must have determined that [the petitioner] possessed the requisite intent

for first degree murder." Burroughs, 2000 WL 122351, at *2.

Although the petitioner has withdrawn his objection to the first-degree murder charge, he argues that the accomplice liability charge was deficient because it was given in conjunction with a first-degree murder charge and the instruction did not make clear that the specific intent to kill necessary for a conviction of first-degree murder must be present in both the actual killer and the accomplice. For this reason, the Court will consider not just the accomplice liability charge, but also the relationship between the two charges.

The petitioner argues that the accomplice liability charge "allowed/invited Petitioner's jury to convict him of first degree murder as an accomplice even though no homicide was 'specifically contemplated by the parties"' and that it \\removed the specific intent element of first degree murder as to an accomplice from the jury's consideration.', Petitioner's Objections, Document No. 19, at 3. The petitioner claims that his trial counsel was ineffective for failing to object to the charge, and that his counsel on direct appeal was ineffective for failing to raise the issue of his trial counsel's ineffectiveness.

This Court must defer to the state court's disposition of the petitioner's ineffective assistance claims, unless (1) the

state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) the state decision involved an unreasonable determination of the facts. 28 U.S.C. § 2254(d)(1) and (2).

The "contrary to" clause has been interpreted to mean that the state court either (1) reached a different conclusion than the Supreme Court on a question of law or (2) faced with materially indistinguishable facts decided a case differently than the Supreme Court did. See Williams v. Tavlor, 529 U.S. 362, 412-413 (2000). To prevail on a claim that a state court's decision is contrary to federal law, "the petitioner must demonstrate that Supreme Court precedent requires the contrary outcome." Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 888 (3d Cir. 1999)(en banc).

If the state court opinion is not found to be "contrary to" federal law, it must then be determined whether it involved an 'unreasonable application" of that law. See id. at 889 (holding that 28 U.S.C. § 2254(d)(1) requires a two-step analysis). Federal law is unreasonably applied when "the state court decision, evaluated objectively and on the merits, resulted in an outcome that cannot be reasonably justified under [existing Supreme Court precedent]." Werts v. Vaughn, 228 F.3d 178, 204

(3d Cir. 2000).

Turning to the state court decision at issue in this case, the PCRA court held as follows. The court found first that the petitioner had waived his claim of ineffective assistance of trial counsel, because it could have been raised on direct appeal but was not.[2] Ordinarily, Brockington would be required to establish that all of his claims were fairly presented to each level of the state courts before he resorted to the federal court. See Lines v. Larkins, 208 F.3d 153, 159 (3d Cir. 2000)(citing 28 **U.S.C.** § 2254(b)). However, the state court's refusal to address the merits of a claim on waiver grounds excuses this exhaustion requirement. See Lambert v. Blackwell, 134 F.3d 506, 518 (3d Cir. 1998). Even though exhaustion is excused, this Court may not consider the merits of such a claim unless "the petitioner 'establishes 'cause and prejudice' or a 'fundamental miscarriage of justice' to excuse the default.'" Lines, 208 F.3d at 160. Because the petitioner has not established either that there was cause for his default or that there has been a fundamental miscarriage of justice in his case, this Court cannot consider his claim that his trial counsel was

[2] In Pennsylvania, an ineffectiveness claim can be raised as soon as new counsel is retained, that is, it can be raised on direct appeal if trial counsel does not handle the appeal. See Commonwealth v. Miller, 564 A.2d 975, 977 (Pa. Super. 1989).

ineffective.

The Superior Court did address the merits of petitioner's claim that he was denied effective assistance by his appellate counsel. In doing so, it applied Pennsylvania's standard for ineffective assistance of counsel, which is co-extensive with the federal standard. See Commonwealth v. Pierce, 527 A.2d 973, 976 (1987)(the Pennsylvania Constitution does not provide greater or lesser protection than the federal standard). In evaluating the challenged jury instruction, the court took into consideration the Pennsylvania Supreme Court's admonishment not to find reversible error based on isolated excerpts of a charge, but to consider it as a whole. See Commonwealth v. Prosdocimo, 578 A.2d 1273, 1274 (1990). This, too, comports with federal law. See Smith v. Horn, 120 F.3d 400, 411 (3d Cir. 1997). The PCRA court's decision in this case was not "contrary to" clearly established federal law because the court applied that law or its equivalent.[3]

Nor did the state court's decision involve an "unreasonable application" of federal law. The relevant Supreme Court precedent is Strickland v. Washinston, 466 U.S. 668 (1984).

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[3] The second approach to the "contrary to" analysis does not apply here, because the state court was not presented with facts which were materially indistinguishable from the facts of a case decided by the Supreme Court. See Williams, 529 U.S. at 412-413.

Under Strickland, the test for ineffective assistance of counsel claims has two prongs. First, the petitioner must prove that counsel's acts or omissions were so unreasonable that no competent lawyer would have pursued them. Second, the petitioner must prove "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'' Strickland, 466 **U.S.** at 694.

The PCRA court held that "[a]fter an exhaustive examination **of** the record and a review of the jury instructions as a whole, there was no error found. The trial court gave the correct instruction on accomplice liability." Commonwealth v. Brockington, Nos. 2122-2123, at 7 (Ct. of Common Pleas Jan. 28, 1997). Because it found that the charge was not in error, the court rejected the petitioner's argument that his appellate counsel was ineffective for not raising the fact that his trial counsel failed to object to it.

The Superior Court's determination that petitioner's appellate counsel was not ineffective, because the underlying jury charge was not objectionable, was not an unreasonable application **of** Strickland. In analyzing jury instructions, a court must look to the challenged language first, but that language must be considered in the context of the charge as a whole. See Smith, 120 F.3d at **411.**

The portion of the charge to which the petitioner objects states that one can be liable as an accomplice for a homicide that neither accomplice nor principal intended. It was given immediately after the following description of the general law of accomplice liability: "A defendant is guilty of a crime if he is an accomplice of another person who committed that crime. He is an accomplice if with the intent of promoting or facilitating the commission of the crime, he solicits, commands, encourages or requests the other person to commit it, or aids, or agrees to aid, **or** attempts to aid the other person in planning or committing it." Trial Transcript at 704. After he charged the jury on accomplice liability, the judge moved into a discussion of homicide in which he explained the differing intent requirements for the different degrees of murder and for voluntary manslaughter. Id. at 708-718.

The challenged accomplice liability charge was accurate as a matter of Pennsylvania law, because accomplice liability extends to non-intentional, i.e., third-degree, murder in Pennsylvania. See Commonwealth v. Wilson, 426 A.2d 575, 575 (Pa. 1981)(defendant was responsible for third-degree murder as an accomplice). Cf. Commonwealth v. Johnson, 719 A.2d 778, 785 (Pa. Super. 1998)(defendant was responsible for third-degree murder as a co-conspirator); Commonwealth v. La, 640 A.2d 1336, 1345 (Pa.

Super. **1994)**(defendant was responsible as a co-conspirator because where a "killing is a natural and probable consequence of a co-conspirator's conduct, murder is not beyond the scope of the conspiracy.").

In addition to being accurate, the challenged accomplice liability charge was clear. There is no reason to believe that the jury could or did conclude from it that if they found that the defendant was an accomplice to a non-intentional homicide they should convict him of first-degree murder. This is especially true given that, after the trial judge instructed the jury on accomplice liability, he moved immediately into his discussion of the intent requirements for the different degrees of murder, which portion of the instruction the petitioner does not challenge. Finally, the charge was appropriately given in this case, because one of the options available to the jury was **to** convict the petitioner **of** third-degree murder as an accomplice.

In his objections to the R & R, the petitioner argues that even if the accomplice liability charge was technically correct, the charge as a whole was deficient because of the fact that this was a first-degree murder case. The petitioner's argument that the charge as a whole was deficient has some support in Pennsylvania law. Despite this support, it was

reasonable for the PCRA court to conclude that appellate counsel was not ineffective for failing to raise trial counsel's failure to object to the charge.

The Supreme Court of Pennsylvania has opined, albeit in dicta, that: **A** general accomplice charge, while legally correct on the law **of** accomplice liability, when given in conjunction with a charge of first degree murder, must clarify for the jury that the specific intent to **kill** necessary for a conviction **of** first degree murder must be found present in both the actual killer and the accomplice." Commonwealth v. Chester, 733 A.2d 1242, 1253 n.11 (Pa. 1999). The instructions in this case did not explicitly state that in order to convict Brockington of first-degree murder as an accomplice to his brother, the jury had to find that Brockington harbored the specific intent to kill.

The Pennsylvania Supreme Court based its conclusion in Chester on its decision in Commonwealth v. Huffman, ***638*** A.2d 961, 962 (Pa. 1994), which invalidated a conviction based on a jury instruction that left the intent requirement ambiguous. Although Huffman was not decided until 1994 - many years after petitioner's appellate counsel decided which arguments to press on appeal - the Chester court noted that "[t]he holding of Huffman was grounded on the decision in Commonwealth **v.** Bachert, [453 A.2d 931 (Pa. 1982)], and thus did not create new

law." Id.

Arguably, then, the charge was objectionable even at the time of trial. However, although the decision in ~~Bachert~~ made it clear that an accomplice had to have the specific intent to kill in order to be convicted of first-degree murder, the opinion said nothing about what jury instructions had to contain. The jury instructions were not discussed in ~~Bachert~~ because they were not challenged. Instead, the court focused on whether there was sufficient evidence to find the defendant guilty **of** first-degree murder as an accomplice.

It was not clear from Bachert that it was improper for a judge to charge the jury on accomplice liability first and then on the intent requirement for first-degree murder separately. See Willis, **97-CV-2114,** at 16 n.6 (holding that counsel was not ineffective for failing to predict the change in the law wrought by Huffman). In addition, Bachert was a single Superior Court case on appeal to the Supreme Court at the time that the trial counsel made his decision not to challenge the instruction, and, as Judge Sabo noted, "each and every instruction was **in** substantial compliance with the draft of the Criminal Subcommittee ***of*** the Pennsylvania Supreme Court Committee for Proposed Jury Instructions." Commonwealth v. Brockington, Nos. 2122-2124, at 8 (Ct. of Common Pleas Apr. 5, 1984).

Finally, the state court could reasonably conclude that appellate counsel was not ineffective for not making an argument based on the instructions because such an argument would have been unlikely to lead to a reversal. Any error found would be subject to harmless error analysis. See Smith, 120 F.3d at 417. The Superior Court was dismissive of the ineffectiveness argument that appellate counsel did choose to make, namely that trial counsel was ineffective for failing to properly argue accomplice and conspiracy theories to the jury in closing argument. The Superior Court found that there was an "overwhelming amount of evidence before the court which strongly suggests that appellant and his co-conspirator did in fact act in concert in the series of transactions which ultimately led to the victim's death." Commonwealth v. Brockington, J.08040/85, at 3 (Pa. Super. Mar. 15, 1985).

There is an additional reason why the state court's rejection of the petitioner's claim was not objectively unreasonable. The second prong of the Strickland test requires that the petitioner establish that he was prejudiced by his counsel's failures. As mentioned above, several courts have found that there can be no prejudice from Huffman-type error

where the jury is properly instructed on conspiracy to kill.[4] See Burroughs, 2000 WL 122351 at *2; Commonwealth v. Wayne, 720 A.2d 456, 465 (Pa. 1998). This provides further support for the conclusion that the state court's decision was not unreasonable.

The Petition for a Writ of Habeas Corpus is denied for all of the above reasons.

BY THE COURT:

Mary A. McLaughlin, J.

[4] In this case, Judge Sabo charged the jury as follows: "First, that the defendant agreed with each other that they would engage in conduct to commit the crime of murder, or agreed to aid one another in the planning or commission of the crime of murder. And second, that the defendant did so with the intent of promoting or facilitating the commission of the crime of murder." Trial Transcript at 722.

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ORDER

AND NOW, this 3d day of January, 2002, upon consideration of the pleadings and record herein, and after review of the Report and Recommendation of the United States Magistrate Judge, for the reasons stated in a memorandum of today's date, it is **HEREBY ORDERED** that:

1. The petition for writ **of** habeas corpus pursuant to 28 U.S.C. § 2254 is **DENIED** and **DISMISSED.**
2. **A** certificate of appealability is not warranted.
3. The Clerk is directed to close the docket for statistical purposes.

BY THE COURT:

Mary A. McLaughlin, J.